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No. 74-1179

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

MITCHELL MILLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 500 F. 2d 751. The court's order denying rehearing *en banc* and the opinion dissenting therefrom (Pet. App. C) are reported at 508 F. 2d 588.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on September 13, 1974. A timely petition for rehearing and suggestion of rehearing *en banc* was denied on January 15, 1975 (Pet. App. C). On February 6, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 16, 1975 (a Sunday), and the

petition was filed on March 17, 1975. The petition was granted on June 9, 1975 (App. 61). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a bank depositor has standing under the Fourth Amendment to challenge alleged irregularities in the issuance and scope of a subpoena *duces tecum* directed to a bank seeking production of its records of his account.

2. Whether (if the depositor has standing) a grand jury subpoena *duces tecum* is defective and violative of the Fourth Amendment (1) because issued by the district court clerk and completed by the United States Attorney's office on behalf of the grand jury, (2) because the grand jury was not sitting on the subpoena's return date, or (3) because the subpoena sought production of all records relating to a named depositor for a period of approximately four months.

3. Whether, if the Fourth Amendment was violated, a retrial was the proper remedy and, if so, whether exclusion of the evidence obtained by the defective grand jury subpoena is required in the retrial.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Rule 17(a), Federal Rules of Criminal Procedure, provides in pertinent part:

> A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. * * *

Rule 17(c), Federal Rules of Criminal Procedure, provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

1. On December 18, 1972, on the basis of information supplied by an informant, a deputy sheriff in the County Sheriff's Department stopped a van-type truck, occupied by respondent's alleged co-conspirators Joseph Brooks and Terry Lee Smith, that was found to contain distillery apparatus (S. Tr. 56–66, 71–75).[1]

[1] "Tr." refers to the two-volume transcript of the trial, held May 7–14, 1973. "S. Tr." refers to the one-volume transcript of the suppression hearing, held April 18 and 23 and May 7, 1973.

On January 9, 1973, while fighting a fire at the Southeastern Metal Company warehouse in Kathleen, Georgia, which was rented to respondent (Tr. 162–168, 178–184), officials of the County Sheriff's Department discovered a 7,500 gallon-capacity distillery, 175 gallons of non-tax-paid whiskey, and related paraphernalia (Tr. 32–44).

Subsequently, at the request of Treasury Department agents who were investigating the distillery operation, subpoenas that had been issued in blank by the district court clerk were completed by the United States Attorney's office and served upon the presidents of the Bank of Byron, in Byron, Georgia, and the Citizens and Southern National Bank, in Warner Robins, Georgia, where respondent maintained accounts (App. 45). The subpoenas required the two bank presidents to appear in the United States District Court for the Middle District of Georgia at 9:00 a.m. on January 24, 1973, and to produce (App. 20, 22):

> all records of accounts, *i.e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22 and 23, 1973].[2]

Both banks maintained microfilm records of bank transactions, in compliance with regulations issued under the Bank Secrecy Act of 1970, 84 Stat. 1114–

[2] One subpoena was served on the president of the Bank of Byron on January 22, 1973; the other was served on the president of the Citizens and Southern National Bank on January 23, 1973.

1124, 12 U.S.C. 1829(d) (App. 24, 28).[3] The banks did not advise respondent that the subpoenas had been served (App. 24, 28).

[3] The Bank Secrecy Act is codified in 12 U.S.C. 1829b (retention of records by insured banks); 12 U.S.C. 1730d (retention of records of savings and loan institutions insured by the Federal Saving & Loan Ins. Corp.); 12 U.S.C. 1951–1959 (retention of records by noninsured financial institutions); and 31 U.S.C. 1051–1122 (reporting of domestic and foreign currency transactions).

The pertinent section of the Act, 12 U.S.C. 1829b(d), provides:

> Each insured bank shall make, to the extent that the regulations of the Secretary so require—
>
> (1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and
>
> (2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

The regulations promulgated pursuant to Section 1829b require that each bank maintain copies of signature cards, ledger cards, and the depositor's social security or taxpayer identification number. 31 C.F.R. § 103.34. Copies of checks upon which the bank is drawee must be maintained unless (1) the check is for not more than $100, or (2) the check is in an exempted category listed in Section 103.34(b)(3), such as certain payroll, dividend, or employee benefit checks. Until the amendment of January 17, 1973, (38 Fed. Reg. 2175–2176), there was no exemption for checks not exceeding $100 (37 Fed. Reg. 6914). Banks which photocopy or record checks deposited to its customer's account in the ordinary course of business must retain such records for two years pursuant to 31 C.F.R. §§ 103.34(b)(10), 301.36(c). Other records required by § 103.34 must be retained for five years. 31 C.F.R. § 103.36(c).

Prior to the effective date of the regulations, the Citizens and Southern National Bank made microfilm copies only of selected transactions rather than of all checks and deposits; the record does not reveal whether the Bank of Byron had previously kept such records (Pet. App. A, pp. 12a–13a).

In compliance with the subpoenas, the presidents of the two banks ordered their employees to make the records available to the agents and provide them with copies of whatever documents they desired (App 24, 28). At the Bank of Byron, Treasury agents inspected microfilm records of the account of Mrs. Minnie Lyn Miller, on which respondent was authorized to draw checks, for the period of time indicated on the subpoena (App. 28). The agents took copies of one deposit slip and one or two checks (App. 41). The Citizens and Southern National Bank supplied the agents with copies of its records of respondent's account during the applicable period, including all checks, deposit slips, two financial statements, and three monthly statements (App. 42–43).[4] The agents then informed the two bank presidents that it would not be necessary for them to appear in person before the grand jury (App. 24, 28).

The grand jury met on February 12, 1973, nineteen days after the return date on the subpoenas.[5] On March 15, 1973, the grand jury returned an indictment in the United States District Court for the Middle District of Georgia, which charged respondent and four others[6] with possession of an unregistered

[4] Copies of the bank records given to the Treasury agents are being lodged with the Clerk of this Court.

[5] The record does not reveal whether any of the bank records were presented to the grand jury.

[6] John Henry McDuffie, Terry Lee Smith, and Joseph Kenneth Brooks were, along with respondent, charged on all five counts. Susan McDuffie Weeks was charged only on the conspiracy count.

still, carrying on the business of a distiller without giving bond and with intent to defraud the government of whiskey tax, possession of 175 gallons of whiskey upon which no taxes had been paid, and conspiracy to defraud the United States of tax revenues, in violation of 18 U.S.C. 371 and 26 U.S.C. 5179, 5205, and 5601, *et seq.* (App. 9–14). The overt acts alleged to have been committed in furtherance of the conspiracy included respondent's rental of a van-type truck from K & B Service Station, for the period October 25 to November 22, 1972, his purchase of antennas and connections for two mobile radio units and two base station radios from Specialty Distributing Company on November 1, 1972, and his purchase of a quantity of sheet metal and metal pipe from Macon Iron and Paper Stock Company on November 11, 1972 (App. 11–12).

The bank records were turned over to the United States Attorney's office to be used in the investigation (App. 43). They provided in "one or two instances" investigatory leads to evidence that subsequently was introduced at trial (*ibid.*).

Prior to trial, respondent moved to suppress the checks and other bank records on the ground that they had been obtained by means of grand jury subpoenas *duces tecum* that were illegal because they were returnable on a date when the grand jury was not in session and they did not specify with reasonable particularity the items sought to be produced (App. 15–19). The district court denied the motion (App. 49).

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2. The trial commenced on May 7, 1973.[7] The evidence showed that respondent had arranged for rental of the warehouse (Tr. 783–789) and had purchased a water pump (Tr. 240–247) and radio equipment found in the warehouse (Tr. 247–258). He had also arranged for the purchase of a truck (later found to contain a still cap and wheat shorts) (Tr. 559–586), paid for repairs of two vans used in the distillery operation (Tr. 327–340), and inquired about making large purchases of sugar (up to 1,000 tons) for a distillery operation (Tr. 298–327). The government introduced into evidence copies of several checks drawn by respondent and payable to Macon Iron and Paper Company (App. 50), the Specialty Distributing Company (*ibid.*) and the K & B Service Station (App. 55). It also introduced copies of respondent's deposit slips, showing that $1,000 had been deposited into his account on November 17, 1972 and $4,770 in December, 1972 (App. 51), and copies of two checks drawn on the account of co-defendant Henry McDuffie and payable to respondent, one of which was in the amount of $1,500 (App. 57).

Respondent testified that he had not participated in the distillery operation (Tr. 815–819) and that he

[7] Respondent's first trial had begun on April 23, 1973, but ended in a mistrial on May 1, 1973.

Of the five persons who had been indicted, John Henry McDuffie and Susan McDuffie Weeks were tried with respondent. The charges against Terry Lee Smith were dismissed prior to trial, and Joseph Kenneth Brooks' motion for severance was granted. Brooks subsequently entered a plea of guilty to one count of the indictment and was sentenced to five years' probation.

had provided services to his co-defendants only at the request of a friend of a long-time associate (Tr. 782–790, 818–820).

Respondent was convicted on each of the five counts and sentenced to concurrent terms of three years' imprisonment on each count.[8]

3. On appeal, the court of appeals held that the subpoenas *duces tecum* served on the two banks were faulty because they were issued by the United States Attorney's office rather than by the district court or the grand jury, were returnable on a date when no grand jury was in session, and required "broad disclosure" of respondent's financial records to the government (Pet. App. A, p. 15a). The court further held that obtaining copies of respondent's bank checks by means of a faulty subpoena *duces tecum* constituted an unlawful invasion of respondent's Fourth Amendment interest in the "privacy" of his papers and records (Pet. App. A, pp. 10a–11a), and that respondent therefore was "entitled to a new trial free from the taint of evidence improperly acquired" (Pet. App. A, p. 16a).[9]

[8] McDuffie was also convicted on all five counts and sentenced to concurrent terms of three years' imprisonment on each count. Weeks was convicted on the conspiracy count and sentenced to a term of five years' probation (Pet. App. A, p. 3a).

[9] The court deferred decision on whether the trial court had improperly overruled, on the basis of lack of standing, respondent's motion to suppress distillery apparatus that had been seized from a truck over which the government showed him to have exercised control. The court noted that respondent had failed at the suppression hearing to assert any proprietary interest in the truck, as is required for standing to challenge a search under

4. The government's petition for rehearing and suggestion of rehearing *en banc* were denied (Pet. App. C, pp. 38a–53a). Seven Circuit Judges dissented from the denial of rehearing *en banc* on the grounds that "the panel opinion departs radically from prior decisions denying to bank customers the standing to challenge subpoenas of bank records of their accounts" (Pet. App. C, p. 39a) and that, even if depositor standing is assumed, "we do not agree that [the subpoenas] were defective. And even if the subpoenas were defective, no prejudice is shown such as to require their suppression" (Pet. App. C, p. 48a).

SUMMARY OF ARGUMENT

The decision of the court of appeals is built on three components, each of which must be correct in order to support suppression at retrial of evidence obtained or derived from the allegedly defective grand jury subpoenas: (1) that a bank depositor has a protectable Fourth Amendment interest in a bank's records of his account; (2) that a subpoena *duces tecum* directed to the bank seeking production of such records is defective if issued by the district court clerk and completed by the United States Attorney's office, returnable on a date when the grand jury is not sitting, or seeking production of records of a depositor's account for a period of approximately four months, and that these defects constitute an unreasonable search and seizure even if the bank voluntarily complies with the subpoena; and (3) that the appropriate remedy is a retrial from which the records and evidence derived therefrom are excluded. We contend that the court erred in its disposition of each of these three issues.

Brown v. *United States*, 411 U.S. 223, but opined that the government's "duplicitous tactics" in opposing respondent's standing to challenge the search of the truck while attempting to prove his control over it might nevertheless be sufficient to confer standing under *Jones* v. *United States*, 362 U.S. 257. Rather than resolve this question, the court relied upon the fact that respondent would have another opportunity at the retrial to assert his proprietary interest in the truck (Pet. App. A, pp. 16a–22a). If this Court agrees with the government that no retrial is necessary, however, the case should be remanded to the court of appeals for disposition of this remaining issue.

The court also affirmed Weeks' conviction and reversed McDuffie's conviction because of the introduction of evidence relating to a prior offense (Pet. App. A, p. 35a). We have not sought review of the court of appeals' decision as it relates to McDuffie.

I

A. Two kinds of interests have been accorded Fourth Amendment protection from unreasonable searches or seizures: a person's proprietary interests in his premises, papers or effects; and his justifiable expectation that the government will not intrude upon his presence in certain private circumstances. Neither of these interests is applicable to bank records of a person's bank account. Such records do not constitute the bank depositor's private papers, since the bank owns and possesses them, no differently from ownership and possession exercised by any party over records it maintains of its business transactions with others. A subpoena directed against the bank seeking access to such records may of course implicate depositors whose transactions with the bank are therein recorded, but

the Fourth Amendment protects only a person "against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." *Jones* v. *United States,* 362 U.S. 257, 261; see *Donaldson* v. *United States,* 400 U.S. 517, 530.

A bank depositor has no justifiable expectation that information he conveys to the bank in the course of his transactions with it will remain private. While the Fourth Amendment bars the government from unreasonably intruding upon a person's private communications, it does not protect that person from government acquisition of the information so conveyed, even if he expects that the party with whom he communicates will not reveal the information to the government. *United States* v. *White,* 401 U.S. 745, 749. A person has no more standing to complain of a subpoena *duces tecum* directed at a bank seeking records of his bank account than of a subpoena directing a trusted friend to testify as to what he knows about the person's affairs.

Nor is there any reason why the confidentiality of information conveyed to banks in the normal course of commercial transactions should be entitled to more protection than similar information conveyed to one's accountant. *Couch* v. *United States,* 409 U.S. 322. Banks have no express or implied contractual obligation to their depositors to resist divulging the records of their accounts to the government, and neither state

nor federal law has recognized a confidential banker-depositor evidentiary privilege.

Finally, the information conveyed on bank checks is not the sort of information that a person justifiably intends to keep private, since he knowingly exposes it to the public in the normal course of his commercial transactions. Indeed, in order for negotiable instruments to be useful as a medium of exchange it is necessary that names of payees or drawers, dates, and other memoranda appearing on them be cognizable to any number of payees, endorsees and bank employees, all of whom are free to record or copy the information so conveyed.

B. The Bank Secrecy Act, which authorizes the Secretary of the Treasury to require that banks maintain records of their depositors' accounts, did not give depositors any proprietary or privacy interest where none existed before. The records remain the bank's property, and depositors have no greater reason than before to expect that the information conveyed therein will remain private. If anything, they have less reason, since the records are required to be maintained because of their potential usefulness in government investigations. Moreover, in promulgating the Act, Congress clearly specified that the record keeping requirements should not alter the manner by which the government traditionally had obtained access to such records when banks voluntarily maintained them. It stressed that "existing legal process" should continue to govern such access. As we have indicated,

"existing legal process" accords no standing to a bank depositor to challenge a subpoena *duces tecum* directed to the bank for copies of its records of the Depositor's account.

II

Even if it is assumed that a bank depositor has standing under the Fourth Amendment to challenge a subpoena *duces tecum* of bank records of his account, the two subpoenas in the instant case—issued in blank by the district court clerk and completed by the United States Attorney's office, returnable on a date when the grand jury did not sit, and seeking records of respondent's account for a period of approximately four months—fully comported with legal process governing the issuance of grand jury subpoenas, and did not constitute an unreasonable search or seizure.

A. Rule 17 of the Federal Rules of Criminal Procedure authorizes the clerk of the district court to issue a subpoena in blank to a party requesting it. There is no need for a court or grand jury to approve each subpoena prior to service since a grand jury subpoena, unlike a search warrant, is merely a request to produce documents and is not self-enforcing. Subpoenaed parties are adequately protected from an unreasonable subpoena by having the opportunity to obtain an order to quash the subpoena if production would be unreasonable or oppressive (Rule 17(c), Fed. R. Crim. P.), or to contest the subpoena in a show cause hearing.

The court of appeals' additional requirement that

the subpoena be returnable on a date when the grand jury is in session is similarly unnecessary and inappropriate, since the grand jury depends upon the presentation of relevant evidence in an orderly manner, which ordinarily requires the government attorney to review the evidence prior to its presentation to the grand jury. Moreover, in many districts the grand jury meets infrequently and its sessions are of brief duration.

Finally, the subpoenas in the instant case were sufficiently particularized. They identified respondent, his home and business address, and the precise dates at issue. The records sought were described with sufficient definiteness so that the subpoenaed parties knew what was sought and were able to comply without undue difficulty—strong evidence of the adequacy of the description. *Brown* v. *United States*, 276 U.S. 134, 143.

B. Even if the subpoenas were defective in one or more of the respects stated by the court of appeals, the question whether they constituted an unreasonable search or seizure nevertheless turns upon the extent to which compliance was burdensome, as against the relevance and materiality of the items sought. Here, the bank rather than the depositor bore the full burden of producing the records. Moreover, the records were clearly relevant and material to the grand jury's inquiry, since they encompassed the period of time from December 18, 1972, when a truck was found to contain distillery apparatus, to January 9, 1973, when a distillery and non-tax-paid whiskey were found at the warehouse, which was rented to respondent.

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In any event, the banks' voluntary compliance with the subpoenas here fully satisfied the Fourth Amendment. Since the bank exercises at least as much control over, and has at least as much access to, its records of a depositor's account as does the depositor himself, the bank has authority to consent to government access to such records, notwithstanding the depositor's interest. *United States* v. *Matlock,* 415 U.S. 164, 171, n. 7; *Frazier* v. *Cupp,* 394 U.S. 731, 740.

III

Even if the subpoenas *duces tecum* were defective and violative of respondent's Fourth Amendment rights, it would not follow that the proper remedy would be a retrial at which the bank records and evidence derived therefrom must be excluded. A new trial would merely waste judicial resources; the excluded records presumably could be reacquired pursuant to validly issued subpoenas, since the government's knowledge of the existence and location of the records was derived independently from the seizure effected under the original subpoenas. *Wong Sun* v. *United States,* 371 U.S. 471, 488.

Even if issuance of the subpoenas was improper, this is not the kind of impropriety for which the drastic remedy of evidentiary suppression is either necessary or appropriate. There is no reason to suppose that any rules that may be announced by the courts regarding the obligations of government attorneys to inform bank depositors when subpoenas are issued for the records of their bank accounts (so that the depositors may challenge any improprieties) would be ignored or disobeyed. Moreover, the exclusionary rem-

edy would be particularly inappropriate in this case, where there is no reason to believe that any deficiency in the subpoenas was deliberate, where at the time of issuance there was no court holding that bank depositors should be notified when bank subpoenas are served, and where it is likely that the subpoenas would have been enforced even had respondent been given an opportunity to challenge them.

ARGUMENT

The decision of the court of appeals is based upon three premises, each of which is necessary to the result it reached: (1) that a bank depositor has a protectable Fourth Amendment interest in a bank's records of his account (discussed in point I, *infra*); (2) that a subpoena *duces tecum* directed to the bank seeking production of such records is defective (a) because issued by the district court clerk and completed by the United States Attorney's office on behalf of the grand jury, (b) because the grand jury was not sitting on the subpoena's return date, or (c) because the subpoena sought production of all records relating to the depositor for a period of approximately four months; and that these defects constitute an unreasonable search or seizure in violation of the Fourth Amendment, even if the bank consents to the government search (discussed in point II, *infra*); and (3) that it is appropriate in these circumstances to have a retrial in which evidence obtained by the defective grand jury subpoenas would be excluded (discussed in point III, *infra*). If the court erred in any of these conclu-

sions, reversal must follow; we contend that each was in error.

I

A BANK DEPOSITOR HAS NO STANDING UNDER THE FOURTH AMENDMENT TO CHALLENGE ALLEGED IRREGULARITIES IN THE ISSUANCE AND SCOPE OF A SUBPOENA DUCES TECUM DIRECTED TO A BANK SEEKING PRODUCTION OF ITS RECORDS OF HIS ACCOUNT

The court of appeals assumed, without articulating its reasoning, that a bank depositor has a protectable Fourth Amendment interest in the bank's records of his account. It seems apparent, however, that this conclusion was based to some extent on the court's notion that the government had "circumvented" the traditional Fourth Amendment protection accorded a person's private papers by requiring the banks to maintain such records and then relying upon the failure of the banks to challenge allegedly improper legal process to obtain them (see Pet. App. A, pp. 13a–14a).

The court thus assumed that various items of information contained on checks that a bank depositor draws on his account or deposits into his account are the constitutional equivalent of the depositor's "private papers" which are protected by the Fourth Amendment from unreasonable government acquisition.[10] But as we show in the following sections, there

[10] The court of appeals primarily relied upon *Boyd* v. *United States*, 116 U.S. 616, in which this Court stated that "a compulsory production of a man's private papers to establish a criminal charge against him * * * is within the scope of the Fourth Amendment * * *" (*id.* at 622). But as the Court recognized in *Couch* v. *United States*, 409 U.S. 322, 330, "[i]n *Boyd*, the person asserting the privilege was in possession of the written statements in question. * * * That case did not, however, address or contemplate the divergence of ownership and possession * * *." Nor, we would add, did it contemplate the complete lack of both ownership and possession.

is no warrant in the history or logic of the Fourth Amendment for expanding the concept of "private papers" to encompass information voluntarily conveyed to a third party, even one who is a trusted (but not privileged) confidant. The fact that the third party is required by law to maintain records of such information creates no protectable interest where none existed before.

Such an unwarranted expansion of Fourth Amendment protection would seriously impair the functioning of the grand jury, which must often rely upon records of transactions maintained by third party institutions, such as banks. Indeed, the Bank Secrecy Act of 1970 was expressly designed to insure that banks maintain adequate records that could be useful in criminal investigations. So long as government access to such records does not abridge the Fourth Amendment rights of the persons who own and maintain them, there is no Fourth amendment impediment to their production.

A. A BANK DEPOSITOR HAS NO PROTECTABLE FOURTH AMENDMENT INTEREST IN A BANK'S RECORDS OF HIS ACCOUNT

The records of a bank depositor's account, owned and maintained by the bank with which he deals, are not within the set of objects or areas whose search or seizure the depositor can protect under the Fourth

Amendment. We show in the following sections that his relationship to the records is too remote to give rise to any protectable Fourth Amendment interest, since he neither owns nor possesses the records and has no reason to expect that their contents will remain private.[11]

1. *A depositor has no proprietary or possessory interest in such records.*

The Fourth Amendment guarantees "[t]he right of the people to be secure in *their* persons, houses, papers, and effects, against unreasonable searches and seizures * * *" (emphasis supplied). Bank records (including the microfilm copies of respondent's checks, deposit slips and statements involved in the instant case)[12] are not the "papers" of bank depositors. They are bank property—made, paid for, and maintained

[11] We do not address the question whether or under what circumstances a bank depositor may have a sufficiently protectable First Amendment interest in bank records of his account to give him standing to challenge a subpoena *duces tecum* directed at the bank for such records. See *California Bankers Assn.* v. *Schultz*, 416 U.S. 21, 55–57; *United States Servicemen's Fund* v. *Eastland*, 488 F. 2d 1252 (C.A.D.C.), reversed and remanded, No. 73–1923, decided May 27, 1975; *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.), affirmed *per curiam*, 393 U.S. 14. Respondent raised no First Amendment claim below, nor does the record reveal any basis for such a claim.

[12] The bank records received by Treasury agents in the instant case included copies of respondent's bank checks, checking account deposit slips, monthly checking account statements, and two financial statements submitted by respondent to the Citizens and Southern National Bank for the purpose of obtaining credit (see copies of the bank records that we have lodged with the Clerk of this Court). Respondent moved to suppress "certain original and microfilm copies of his personal and business checks * * * as well as other information supplied" (App. 16). On appeal, respondent challenged the introduction at trial of copies of the bank checks (Pet. App. A, p. 9a). The court of appeals held that the trial court should not have admitted into evidence copies of respondent's bank checks or "any evidence resulting from investigative leads provided by information from those checks" (Pet. App. A, p. 16a). The record does not reveal whether any evidence resulted from investigative leads provided by such information or by information on the deposit slips, checking account statements, or two financial statements.

by the bank for its convenience and for business and legal purposes.[13] The bank is a party to each of the transactions that it records, and earns a portion of its income from conducting such transactions. See *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 66. The bank's ownership, possession and control of the records is no different from the ownership, possession and control exercised by any party over records it maintains of its business transactions. Hence the records are, like corporate records of salary payments and

[13] To be sure, the cancelled checks themselves are the property of the drawer. (At common law a check became the property of the drawer when paid; the bank thereafter held the check as the drawer's agent. See *Van Dyke* v. *Ogden Sav. Bank*, 48 Utah 606, 615–616, 161 Pac. 50, 54 (1916); *The Queen* v. *Watts*, 169 Eng. Rep. 398, 401 (C.C. 1850); *Burton* v. *Payne*, 172 Eng. Rep. 236 (K.B. 1827); *Partridge* v. *Coates*, 171 Eng. Rep. 976, 977 (K.B. 1824); Grant, *A Treatise on the Law Relating to Bankers and Banking* 75–78 (1857); 2 Morse, *A Treatise on the Law of Banks and Banking* § 460 (6th ed. 1928). See also Uniform Commercial Code §§ 4–201, 4–105(d), 4–208). But this has no bearing upon the legal status of microfilm copies of the checks that are maintained by the bank.

While certain commercially valuable information may be characterized as "property" (see, *e.g.*, *Board of Trade of the City of Chicago* v. *Christie Grain and Stock Co.*, 198 U.S. 236, 251), there is no contention that the information continued on respondent's checks, deposit slips and statements was commercially valuable.

other transactions with an employee-taxpayer sought by an Internal Revenue summons, "records in which the taxpayer [or depositor] has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer [or depositor]." *Donaldson* v. *United States*, 400 U.S. 517, 523.

The Court in *Donaldson* accordingly held that the employee-taxpayer had no right to intervene in a proceeding to enforce an Internal Revenue Service summons against the taxpayer's former employer and its accountant for production of records of the taxpayer's employment and compensation during the years under investigation. In language that is as applicable to grand jury investigations as it was to Internal Revenue investigations, the Court concluded that if taxpayers had a right to intervene when the summons sought production of such records from a third party, it "would unwarrantedly cast doubt upon and stultify the Service's every investigatory move" (*id.* at 531).[14] For, as Mr. Justice Douglas observed in

[14] Similarly, in *Application of Cole*, 342 F. 2d 5 (C.A. 2), certiorari denied, 381 U.S. 950, which was cited with approval in *Donaldson* (400 U.S. at 530), the court held that a taxpayer had no right to notice of the issuance of a summons to its bank. As the Second Circuit there explained (342 F. 2d at 7–8):

"* * * [A]ll of the records, documents and papers which were the subject matter of the summons were the property of the Bank on whom the summons was served. None of the material sought belonged to the taxpayers or involved the work product of their attorneys. They had no interest in any of them in the sense that they had a right to any of them. * * *

"The taxpayer, under circumstances where only books, records and other papers belonging to the third party are the subject of the summons, has no standing to object to the summons."

his concurring opinion (*id.* at 537), "it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress."

Thus, because of the interrelationship between the intervention question and the rights sought to be asserted," *Donaldson* was in part an application of the general principle that the Fourth Amendment does not protect *jus tertii* interests. As this Court stated in *Jones* v. *United States*, 362 U.S. 257, 261, the Fourth Amendment protects a person "against whom the search was directed, as distinguished from one who claims prejudice only through the use of the evidence gathered as a consequence of a search or seizure directed at someone else." See also *Alderman* v. *United States*, 394 U.S. 165, 171–173; *Wong Sun* v. *United States*, 371 U.S. 471, 492; *Goldstein* v. *United States*, 316 U.S. 114, 121. While a depositor may feel genuinely unhappy about a government seizure of records belonging to the bank with which he has an account, particularly if the records contain information that incriminates him, his Fourth Amendment rights are not violated even if the government improperly obtains the documents. Cf. *Burdeau* v. *McDowell*, 256 U.S. 465.

Accordingly, the great majority of federal courts that have considered the issue (usually in the context

[15] Rule 24(a)(2), Fed. R. Civ. P., authorizes intervention as of right by an individual who has "an interest relating to the property * * * which is the subject of the action" and who "is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest."

of Internal Revenue Service summonses rather than grand jury subpoenas) have concluded, correctly we submit, that a bank's records of its transactions with a depositor are not the private papers of the depositor, and that the depositor therefore has no standing to challenge the validity of a search or seizure of bank records of his account.[16]

[16] See *United States* v. *Continental Bank and Trust Co.*, 503 F. 2d 45, 49–50 (C.A. 10) (IRS summons); *Fifth Avenue Peace Parade Committee* v. *Gray*, 480 F. 2d 326, 332 (C.A. 2), certiorari denied, 415 U.S. 948 (FBI investigation); *United States* v. *Gross*, 416 F. 2d 1205, 1212–1213 (C.A. 8) (FBI investigation); *Dosek* v. *United States*, 405 F. 2d 405, 409 (C.A. 8) (IRS summons); *Harris* v. *United States*, 413 F. 2d 316, 318 (C.A. 9) (grand jury investigation); *Galbraith* v. *United States*, 387 F. 2d 617, 618–619 (C.A. 10) (SEC civil investigation); *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969 (IRS summons); *Application of Cole*, 342 F. 2d 5, 8 (C.A. 2), certiorari denied, 381 U.S. 950 (IRS summons); *DeMasters* v. *Arend*, 313 F. 2d 79, 85 (C.A. 9), petition for certiorari dismissed, 375 U.S. 936 (IRS summons); *Foster* v. *United States*, 265 F. 2d 183, 187–188 (C.A. 2), certiorari denied, 360 U.S. 912 (IRS summons); *United States* v. *Peoples Deposit Bank & Trust Co.*, 112 F. Supp. 720, 723–724 (E.D. Ky.), affirmed, 212 F. 2d 86 (C.A. 6) (IRS summons), certiorari denied, 348 U.S. 838; *In re Upham's Income Tax*, 18 F. Supp. 737, 738 (S.D.N.Y.) (IRS summons); *Cooley V. Bergin*, 27 F. 2d 930, 933 (C.A. 2) (IRS summons); cf. *Pollard* v. *Roberts*, 283 F. Supp. 248, 258–259 (E.D. Ark.), affirmed *per curiam*, 393 U.S. 14. And see *Riddick* v. *United States*, C.A. 8, No. 75–1060, denied July 15, 1975, slip op. pp. 8–10, specifically declining to follow the court of appeals' decision in the present case. But see *Burrows* v. *Superior Court of San Bernardino County*, 529 P. 2d 590, petition for rehearing denied, March 12, 1975 (Sup. Ct. of Cal.).

Moreover, cases following *Donaldson* have uniformly denied depositors any right to intervene in summons enforcement proceedings for bank account records, on the ground that depositors have no proprietary interest in the records. See *United*

2. *A depositor has no reason to expect that the information contained in such records will remain private.*

a. A bank depositor does not, for Fourth Amendment purposes, entertain any "reasonable expectation of freedom from governmental intrusion" (*Mancusi* v. *DeForte*, 392 U.S. 364, 368; *Katz* v. *United States*, 389 U.S. 347, 352) with regard to his banking transactions. While *Katz* held that government electronic surveillance of a telephone booth without a warrant violated the occupant's Fourth Amendment right to be free from unreasonable government eavesdropping, it did not hold that the user of a telephone booth is constitutionally protected from subsequent government acquisition from the other party to an unprivileged conversation of the information therein conveyed. To the contrary, as Mr. Justice White explained in *United States* v. *White*, 401 U.S. 745, 749 (in a portion of the plurality opinion with which no Justice expressed disagreement):

States v. *National State Bank*, 454 F. 2d 1249, 1251, n. 3, 1252 (C.A. 7); *Securities and Exchange Commission* v. *First Security Bank of Utah*, 447 F. 2d 166, 168 (C.A. 10); *United States* v. *Bremicker*, 365 F. Supp. 701, 702–703 (D. Minn.); *United States* v. *Union Nat'l Bank*, 363 F. Supp. 629, 631–633 (W.D. Pa.); *United States* v. *Northwest Pa. Bank & Trust Co.*, 355 F. Supp. 607, 612, 614 (W.D. Pa.); *Smith* v. *Switzer*, 73–2 U.S.T.C., ¶ 9490 (W.D. Pa., May 30, 1973). See also *United States* v. *Luther*, 481 F. 2d 429, 433 (C.A. 9) (taxpayer lacked proprietary interest in corporate records); *United States* v. *Weingarden*, 473 F. 2d 454, 458, n. 4 (C.A. 6) (taxpayer had no proprietary interest in attorney's records); *United States* v. *Widelski*, 452 F. 2d 1, 4 (C.A. 6) (no proprietary interest or privilege in accountant's records).

> *Katz* involved no revelation to the Government by a party to conversations with the defendant nor did the Court indicate in any way that a defendant has a justifiable and constitutionally protected expectation that a person with whom he is conversing will not then or later reveal the conversation to the police.
>
> * * * * *
>
> * * * [H]owever strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities.

See also *Hoffa* v. *United States*, 385 U.S. 293; *Lewis* v. *United States*, 385 U.S. 206.

The same reasoning applies to a depositor's transactions with his bank. If the Fourth Amendment does not protect information given to a colleague who turns out to be a government agent, "however strongly a defendant may trust [him]" (*United States* v. *White*, *supra*, 401 U.S. at 749), it can scarcely be applicable to information voluntarily given to a bank that is not a government agent and that furnishes the information to the government pursuant to valid legal process.

Of course, bank checks and the maintenance of a bank account offer a convenient means of carrying on commercial transactions, and many persons deposit a part of their earnings in a bank in order to use its negotiable instruments in place of cash. But it is no more necessary to use bank checks and maintain a bank account than it is to engage in employment, sales, or business transactions or for some taxpayers to have

an accountant, and the confidentiality of information conveyed to banks in the normal course of commercial transactions is entitled to no more protection than is similar information conveyed to other persons with whom one deals or to one's accountant. See *Donaldson* v. *United States, supra; Couch* v. *United States,* 409 U.S. 322. Banks have no express or implied contractual obligation to their depositors to resist divulging the records of their accounts to the government.[17] And

[17] Some courts have held that a bank may not divulge customer information to other members of the public, basing their decision on implied contract, property, agency, or tort principles. See, *e.g.*, *Sparks* v. *Union Trust Company*, 256 N.C. 478, 124 S.E. 2d 365 (implied contract); *Milohnich* v. *First National Bank*, 24 So. 2d 759 (3d D. C.A. Fla.) (implied contract); *Brex* v. *Smith*, 104 N.J. Eq. 386, 146 Atl. 34 (property); *Peterson* v. *Idaho First National Bank*, 83 Idaho 578, 367 P. 2d 284 (agency); *Sewall* v. *Catlin*, 3 Wend. 291, 294–295 (Sup. Ct. N.Y.) (tort).

Nothing in the history of the relationship between banks and their depositors, however, would create a justifiable expectation that information conveyed in transactions with the bank would not be revealed to the government. To the contrary, it has been recognized that banks have a public duty to expend a reasonable effort in furnishing the government with records needed in judicial proceedings or in attempting to comply with a subpoena *duces tecum*. See, *e.g.*, *United States* v. *Dauphin Deposit Trust Co.*, 385 F. 2d 129, 130 (C.A. 3); *McMann* v. *Securities Exchange Commission*, 87 F. 2d 377 (C.A. 2), certiorari denied, 301 U.S. 684; *United States* v. *Jones*, 73–1 U.S.T.C. ¶ 9197 (M.D. Ala., October 6, 1972); *United States* v. *First Nat'l Bank of Mobile*, 67 F. Supp. 616, 625 (S.D. Ala.); see also *United States* v. *Bremicker*, 365 F. Supp. 701, 703 (D. Minn.) ("it would appear that the bank [served with an IRS summons] has a duty to cooperate, even in the absence of a court order").

no confidential banker-depositor privilege has been recognized under state or federal law.[18] "[T]he mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege." 8 Wigmore, *Evidence* § 2286, at 528 (McNaughton rev. 1961). As this Court recently noted, privileges such as those governing the relationship between attorney and client or priest and penitent are "exceptions to the demand for every man's evidence [and] are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710. Accordingly, the bank depositor has no justifiable expectation that information about his bank-

[18] See 8 Wigmore, *Evidence* § 2286 (McNaughton rev. 1961); see also *Bowles* v. *Shawano National Bank*, 151 F. 2d 749 (C.A. 7); *Foster* v. *United States*, *supra*; *Schulze* v. *Rayunec*, 350 F. 2d 666 (C.A. 7), certiorari denied *sub nom. Boughner* v. *Schulze*, 382 U.S. 919; *United States* v. *Gross*, 416 F. 2d 1205, 1212–1213 (C.A. 8) (opinion by Blackmun, J.); *United States* v. *Bremicker*, 365 F. Supp. 701, 702–703 (D. Minn.); *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D. D.C.); *In re Davies*, 68 Kan. 791, 75 Pac. 1048; *State ex rel. G. M. Gustafson Co.* v. *Crookston Trust Co.*, 222 Minn. 17, 22 N.W. 2d 911.

See also *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377, 378–379 (C.A. 2), certiorari denied, 301 U.S. 684, in which the court refused to enjoin stockbrokers from complying with two SEC subpoenas *duces tecum* seeking copies of McMann's account. In response to McMann's arguments that the information sought was privileged and confidential and therefore constitutionally protected, Judge Learned Hand stated for the court:

"But the very fact that testimonial privileges are based upon specified confidential relations, is proof that they do not extend to all, and it hardly needs to be said that nobody by contract, express or implied, can abridge public duties."

ing transactions will not be acquired by the govenment.[19]

b. Even if it were assumed that the Fourth Amendment prohibits an unreasonable governmental seizure from a third person of information that one justifiably intends to keep private, the information conveyed on bank checks is not within that category. Names of payees or drawers, dates, and other memoranda appearing on such negotiable instruments are not intended to be confidential. Indeed, the commercial function of negotiable instruments requires that such information be conveyed. When a bank check is drawn, the instrument is cast forth upon a stream of commerce. A drawer understands that his payees may well endorse the instruments to third parties and that their endorsees may further endorse them. Nor can he prevent them from doing so. He normally has no control over the identities and number of persons other than his payee who ultimately will view the instrument, or to what extent any of them will record the information contained thereon.[20] Even when presenting for deposit a check drawn on someone else's account, he is aware that the instrument "will be viewed by various employees at the bank where it is cashed

[19] Indeed, even in relationships where a privilege is recognized, such as the attorney-client relationship, the privilege extends only to confidential communications between them and not to information concerning their financial transactions, such as the amount of the fee and who paid it. See, *e.g.*, *In re Michaelson*, 511 F. 2d 882 (C.A. 9), certiorari denied May 19, 1975 (No. 74–1011); *In re Semel*, 411 F. 2d 195, 197 (C.A. 3), certiorari denied, 396 U.S. 905; *Colton* v. *United States*, 306 F. 2d 633, 637 (C.A. 2), certiorari denied, 371 U.S. 951.

[20] See Chorley, *Law of Banking* 13–22 (4th ed. 1960).

or deposited, at the clearing house through which it must pass, and at his own [the drawer's] bank to which it will eventually return." *Harris* v. *United States,* 413 F. 2d 316, 319–320 (C.A. 9). See also *United States* v. *Judson,* 322 F. 2d 460, 463 (C.A. 9).

To be sure, those who are likely to view the instrument in commerce probably will not pay great attention to the identities of the drawer or payee, attach any special significance to the transaction, or remember its other details. But they are at liberty to do so, and the Fourth Amendment does not protect a person's expectation that others will not give close attention to what he knowingly exposes to them. Indeed, anyone who happens to view a negotiable instrument that is sent into commerce is free to keep a detailed record, or a copy, of it. If the viewer happens to be a large-scale creditor or debtor who handles a great number of such instruments, his records may well reveal much about the activities of those with whom he transacts. Since a bank is functionally equivalent to any other large-scale debtor that honors negotiable instruments drawn and sent into commerce by its creditors, the information that it receives on negotiable instruments that are presented for payment is no more immune from disclosure than is similar information on notes presented to other borrowers for payment. Cf. *California Bankers Assn.* v. *Schultz, supra,* 416 U.S. at 48–49.

The Fourth Amendment does not protect what "a person knowingly exposes to the public * * *." *Katz* v. *United States, supra,* 389 U.S. at 351. Accordingly, when a bank depositor voluntarily puts his checks into a public stream of commerce, there is no reason to protect him from government access to them. Nor is there any constitutional basis for " 'constructing a wall of privacy against the grand jury which does not exist in casual contacts with strangers.' " *United States* v. *Dionisio,* 410 U.S. 1, 14. Indeed, "the long-standing principle that 'the public * * * has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege * * * is particularly applicable to grand jury proceedings." *Branzburg* v. *Hayes,* 408 U.S. 665, 688 (footnote omitted). Accordingly, while some may believe that it is desirable as a matter of policy to adopt various measures limiting government access to bank records, this is a matter of legislative policy for determination by Congress, not a constitutional imperative.[21]

[21] Bills have recently been introduced in Congress to limit the disclosure of bank information. See S. 1343, 9th Cong., 1st Sess. (1975) ("[i]n any proceeding relating to such subpenas [of bank records] * * *, the customer shall have the same rights as if the records were in his possession." Section 4(b)); H.R. 2752, 94th Cong., 1st Sess. (1975) (same language); H.R. 550, 94th Cong., 1st Sess. (1975). Cf. 47 U.S.C. 605; 18 U.S.C. 2511 (telephone company or its employees prohibited from divulging the "existence, contents, substance, purport, effect, or meaning" of communications); 15 U.S.C. 1681–1681t (credit reporting agencies subject to statutory limitations and penalties for release of information gathered on consumers).

B. THE RECORD-KEEPING REQUIREMENTS OF THE BANK SECRECY ACT DID NOT CREATE ANY PROTECTABLE FOURTH AMENDMENT INTEREST OF A BANK DEPOSITOR IN THE BANK'S RECORDS OF HIS ACCOUNT

The Bank Secrecy Act of 1970,[22] which authorized the Secretary of the Treasury to prescribe by regulation certain record-keeping and reporting requirements for banks, did not create any proprietary or privacy interest of depositors in their bank accounts where none existed before. Under the Act each bank continues to pay for copying and storing its records, and the records remain the bank's property. Moreover, as this Court observed in *California Bankers Assn.* v. *Shultz, supra,* 416 U.S. at 48–49, the bank continues to be a party to all the transactions which it records. Hence, the mandatory record-keeping requirements of the Act do not transform the bank into a government agent. *Id.* at 52. "[I]n making the records required by the Secretary * * * [the bank] neither searches nor seizes records in which the depositor has a Fourth Amendment right." *Id.* at 54.

Indeed, the compulsory record-keeping provisions of the Act give depositors even less reason than before to expect that information conveyed in their bank transactions will be private. Just as this Court noted in *Couch* v. *United States, supra,* that "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return" (409 U.S. at 335), so here there can be little expectation of privacy in those transac-

[22] See n. 8, *supra.*

tions with a bank for which it is required to maintain records because of Congress's determination that such records "have a high degree of usefulness in criminal, tax, or regulatory investigations * * *." 12 U.S.C. 1829b(a)(2).

It would be a gross anomaly if this Act, which was designed to insure the maintenance of bank records to aid law enforcement investigations, resulted in less governmental access to them than when the records were voluntarily maintained. Prior to enactment of the Bank Secrecy Act, it had been the practice of many banking institutions to photocopy their checks.[23] In the instant case, for example, prior to mandatory record-keeping, the Citizens and Southern National Bank, where respondent maintained an account, had microfilmed all checks presented at the bank for payment; other checks were microfilmed elsewhere (App. 38). But it was often difficult to retrieve copies of particular checks because checks were not microfilmed in any particular order, and few institutions microfilmed all checks (*ibid.;* see also H.R. Rep. No. 91–975,

[23] Since 1928 most banks have retained photocopies or microfilm of cancelled checks to insure against lost items or spurious claims. See Hearings on H.R. 15073 before the House Committee on Banking and Currency, 91st Cong., 1st and 2d Sess. 72–74, 320–321, 340 (1969–1970) (hereinafter "House Hearings"). Prior to the development of microfilming, however, the information contained in these documents was generally limited to dates and amounts of debits annd credits. Names of payees and endorsees were not usually recorded. See Chorley, *Law of Banking* 112–114 (4th ed. 1960); Fiske, *The Modern Banks* 79 (1904) (after clearinghouses developed, some banks would record additional information in a "transit" ledger on checks sent for collection); see also *United States* v. *First National Bank of Mobile*, 67 F. Supp. 616, 619 (S.D. Ala).

91st Cong., 2d Sess. 11 (1970)). In light of this difficulty, Congress promulgated the Bank Secrecy Act to assure uniform and systematic record-keeping and to "insure that domestic banks and financial institutions continued to maintain adequate records of their financial transactions with their customers" (*California Bankers Assn.* v. *Shultz, supra,* 416 U.S. at 26–27).[24]

In so doing, Congress clearly specified that the recordkeeping requirements should not alter the manner by which the government traditionally had obtained access to bank records when the banks maintained them voluntarily. It stressed that "existing legal process" should continue to govern such access (H.R. Rep. No. 91–975, *supra,* at 10; see also S. Rep. No. 91–1139, 91st Cong., 2d Sess. 5 (1970)).[25] Reiterat-

[24] See Hearings on S. 3814 and S. 3828 before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 2d Sess. 41–60, 106–122 (1972) (hereinafter "Senate Hearings"); House Hearings 10–180.

[25] The Report of the House Committee on Banking and Currency stated (H.R. Rep. No. 91–975, 91st Cong., 2d Sess. 10):

"It should be borne in mind that records to be maintained pursuant to the regulations of the Secretary of the Treasury will not be made automatically available for law enforcement purposes. They can only be obtained through existing legal process."

The Senate Banking Committee's report stated (S. Rep. No. 91–1139, 91st Cong., 2d Sess. 5):

"Access by law enforcement officials to bank records required to be kept under this title would, of course, be only pursuant to a subpena or other lawful process as is presently the case. The legislation in no way authorizes unlimited fishing expeditions into a bank's records on the part of law enforcement officials."

See also Letter of Secretary of the Teasury George P. Shultz, June 19, 1972, in Senate Hearings at 292.

ing this stated intent, the regulations promulgated under the Act provide that inspection, review, or access to the records required by the Act to be maintained is governed by existing legal process. 31 C.F.R. 103.51; see *California Bankers Assn.* v. *Shultz, supra,* 416 U.S. at 34, n. 8. As we have indicated, under "existing legal process" (as it now exists and as it existed at the time the Bank Secrecy Act was enacted) a bank depositor is without standing to challenge under the Fourth Amendment a subpoena *duces tecum* directed at the bank for copies of its records of transactions in the depositor's account.[26]

[26] In *California Bankers Assn.* v. *Schultz, supra,* 416 U.S. at 52, the Court stated: "We see nothing in the Act which violates the Fourth Amendment rights of any of these plaintiffs. Neither the provisions of Title I [the record-keeping requirements] nor the implementing regulations require that any information contained in the records be disclosed to the Government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process."

The court of appeals in the instant case apparently interpreted this to mean that "existing legal process" for bank records protects Fourth Amendment interests of bank depositors, and that depositors therefore have standing to challenge the legality of such process (see Pet. App. A, pp. 14a–15a). But there is no basis in this Court's opinion in *California Bankers* for inferring such an unwarranted extension of the Fourth Amendment. Indeed, in the next ensuing paragraph of the *California Bankers* opinion the Court noted that it had "decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank *or the person under investigation by the taxing authorities*" (416 U.S. at 53; emphasis supplied) and quoted with approval Mr. Justice Douglas' concurring statement in *Donaldson* that "'[I]t is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress'" (*ibid.*).

II

A GRAND JURY SUBPOENA DUCES TECUM IS NOT DEFECTIVE, NOR DOES IT VIOLATE THE FOURTH AMENDMENT, (1) BECAUSE ISSUED BY THE DISTRICT COURT CLERK AND COMPLETED BY THE UNITED STATES ATTORNEY'S OFFICE ON BEHALF OF THE GRAND JURY, (2) BECAUSE THE GRAND JURY WAS NOT SITTING ON THE SUBPOENA'S RETURN DATE, OR (3) BECAUSE THE SUBPOENA SOUGHT PRODUCTION OF ALL RECORDS RELATING TO A NAMED DEPOSITOR FOR A PERIOD OF APPROXIMATELY FOUR MONTHS

Even if it were assumed *arguendo* that a depositor has standing to challenge a subponea *duces tecum* of bank records of his account, the court of appeals has radically (and, we submit, erroneously) departed from tradition and practice in holding that a grand jury subpoena is defective, and that the defects constitute an unreasonable search and seizure, when it is "issued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of * * * financial records to the government * * *" (Pet. App. A, pp. 14a–15a).

The two subpoenas in question here were issued in blank by the district court clerk, completed by the United States Attorney's office, and served by Treasury agents upon the presidents of the two banks where respondent maintained accounts. They required the bank presidents to appear in the United States District Court for the Middle District of Georgia at 9:00 a.m. on January 24, 1973, and to produce (App. 20, 22):

> all records of accounts, *i.e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 22, 1973 in the case of one bank, and January 23, 1973 in the case of the other].

The grand jury did not meet until February 12, 1973, nineteen days after the earlier return date on the subpoenas.

As we shall now show, there was nothing "defective" about these subpoenas; their issuance conformed to "existing legal process" and accepted practice. The requirements inferentially imposed by the court of appeals would be impractical and time-consuming. In any event, the subpoenas, even if defective, did not constitute an unreasonable search or seizure.

A. THE SUBPOENAS WERE NOT DEFECTIVE

It is not clear from its opinion whether the court intended that any of the three noted "defects" would alone have sufficed to justify the result it reached, or whether its action depended upon the convergence of all three factors. In any event, we submit that none of the three factors consituted a "defect," and that the subpoenas *duces tecum* in the instant case—issued by the clerk of the court and completed by the United States Attorney's office on behalf of the grand jury, returnable 19 days before the grand jury was to meet, and calling for bank records of respondent's accounts during a four-month interval—was duly authorized in

accordance with "existing legal process." *California Bankers Assn.* v. *Shultz, supra,* 416 U.S. at 54, n. 24.

1. *A subpoena may be issued in blank by the district court clerk to any party requesting it.* The subpoenas *duces tecum* here were issued in accordance with Rule 17(a), Fed. R. Crim. P., which provides in pertinent part:

> A subpoena shall be issued by the *clerk* under the seal of the court * * *, signed and sealed but other wise *in blank* to a party requesting it * * * [Emphasis supplied.]

Moreover, it is generally accepted practice for such subpoenas to be "issued in the name of the district court over the signature of the clerk * * * pro forma and in blank to anyone requesting them." *In re Grand Jury Proceedings* (*Schofield I*), 486 F. 2d 85, 90 (C.A. 3); *In re Lopreato,* 511 F. 2d 1150, 1152 (C.A. 1).[27]

It is unclear precisely what the court of appeals would require in place of the procedure that was employed in the instant case, other than having the court or grand jury approve each subpoena prior to its being served. But either of these alternatives would be needless and impractical. The necessity of prior grand jury approval would substantially impede the effective functioning of the grand jury. The grand jury depends upon the presentation of relevant evi-

[27] See also *United States* v. *Morton Salt Co.,* 216 F. Supp. 250 (D. Minn.), affirmed *per curiam,* 382 U.S. 44; *United States* v. *Van Allen,* 28 F.R.D. 329 (S.D.N.Y.); *United States* v. *Culver,* 224 F. Supp. 419 (D. Md.); *In re Subpoenas Duces Tecum,* 248 Fed. 137 (E.D. Tenn.).

dence in an orderly manner—necessitating that the government attorney review the evidence prior to grand jury consideration, often before the grand jury is called into session.[28] For example, the practice in the Middle District of Georgia, according to the district court, is for the United States Attorney "to prepare for the calling of the grand jury and to prepare matters to be presented to it" (App. 46). A requirement that the grand jury itself issue the subpoena therefore would be unnecessarily time-consuming and (particularly in districts where the grand jury meets infrequently and its sessions are of brief duration) difficult to arrange. See *Martin* v. *Beto,* 397 F. 2d 741, 745 (C.A. 5), certiorari denied, 394 U.S. 906; *United States* v. *Kleen Laundry & Cleaners, Inc.,* 381 F. Supp. 519, 521 (E.D.N.Y.).

The alternative requirement, that the court approve each subpoena prior to issuance, would be cumbersome and wasteful of judicial resources. A subpoena, unlike a search warrant, is merely a request to produce documents or to testify. It does not constitute a self-enforcing governmental intrusion upon possession of property necessitating prior judicial scrutiny, since nothing is thereby taken from the subpoenaed party, who may obtain an order to quash the subpoena if production would be "unreasonable or oppressive" (Rule 17(c), Fed. R. Crim. P.) or contest the subpoena in a show cause hearing. *United States* v. *Ryan,* 402 U.S. 530; *Cobbledick* v. *United States,* 309 U.S.

[28] See, *e.g.*, *United States* v. *Johns-Manville Corp.,* 213 F. Supp. 65, 73–74, n. 20 (E.D. Pa.).

323.[29] Before passing upon an application for enforcement of a subpoena, a court in any event must afford the subpoenaed party an opportunity to present the defenses that may be available to him. See *Gelbard* v. *United States,* 408 U.S. 59–60; *In re Grand Jury Proceedings* (*Schofield I*), *supra,* 486 F. 2d at 88–92.

To be sure, the power to subpoena bank records without the necessity of obtaining prior judicial approval of each subpoena may on occasion be abused, as all power may be abused. The solution, however, is not to restrict that authority so as to undermine the efficacy of grand jury investigations. As this Court recently observed with regard to a similar potential for abuse in the issuance of Internal Revenue Service summonses, " '[t]hat the power may be abused, is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds, and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts.' " *United States* v. *Bisceglia,* 420 U.S. 141, 151 (citations omitted).

2. *A subpoena duces tecum need not be returnable on a date when the grand jury is sitting.* The court of appeals' additional requirement that subpoenas *duces tecum* be returned on a date when the grand jury is sitting would seriously inconvenience grand juries that meet infrequently and in sessions of rela-

[29] See also *Oklahoma Press Publishing Company* v. *Walling,* 327 U.S. 186, 208–209; *United States* v. *Birrell,* 242 F. Supp. 191, 204 (S.D.N.Y.); *Application of Kelly,* 19 F.R.D. 269 (S.D.N.Y.).

tively brief duration. This requirement would sometimes necessitate that the grand jury be convened solely for the purpose of being in session when subpoenaed items are produced, notwithstanding that the government attorney who is conducting the grand jury's investigation will not present the items for its consideration until a later date.

This formality would serve no legitimate purpose. It would not protect against the possibility that subpoenas *duces tecum* might be used improperly by the government to further its own investigations rather than to aid the grand jury,[30] nor would it enhance the role of the court or grand jury in supervising the acquisition of evidence to be presented before it.

Nor, prior to the decision in the instant case, had any court imposed such a requirement.[31] To the con-

[30] A grand jury subpoena may not be used for the sole purpose of preparing a case for trial. See, *e.g.*, *United States* v. *Del Toro,* 513 F. 2d 656, 664 (C.A. 2); *Durbin* v. *United States,* 221 F. 2d 520, 522 (C.A.D.C.); *United States* v. *O'Connor,* 118 F. Supp. 248 (D. Mass.).

[31] While several courts have required, pursuant to Rule 17(a), Fed. R. Crim. P., that subpoenas *ad testificandum* be returned on a date when the grand jury is sitting (see, *e.g.*, *United States* v. *Hedge,* 462 F. 2d 220, 223 (C.A. 5); *United States* v. *Standard Oil Co.,* 316 F. 2d 884 (C.A. 7)), that requirement is inapplicable to subpoenas *duces tecum* issued pursuant to Rule 17(c). Rule 17(c), Fed. R. Crim. P., provides that "[t]he court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or *prior to the time when they are to be offered in evidence* and may upon their production permit [them] to be inspected by the parties and their attorneys" (emphasis supplied). It is unclear, however, whether such prior production requires a separate court order, or whether a duly issued subpoena is sufficient. See 8 Moore's *Federal Practice* ¶ 17.07 (2d ed., 1972); 1 Wright, *Federal Practice and Procedure: Criminal* § 272 at 550–551 (1969).

trary, in *United States* v. *Morton Salt Co., supra,* a government attorney had procured a subpoena *duces tecum* issued from the office of the clerk of the court and returnable 23 days before the grand jury was impaneled (216 F. Supp. at 252–253). The defendants contended that this procedure was improper. The court, finding this argument "patently unsound," noted that "[t]he right of government counsel to inspect documents before presenting them to the Grand Jury is well recognized and fairly comes within the purview of Rule 17(c)" (*id* at 257).

It is, in any event, difficult to see why the depositor should be heard to complain about the return dates of the subpoenas, when the banks, upon whom the burden of compliance fell, found those dates unobjectionable. See point I, *supra.*

3. *The subpoenas were sufficiently particularized.* The court of appeals also found the subpoenas to be defective because they "compelled broad disclosure of [respondent's] financial records to the government" (Pet. App. 15a). But the court did not specify what it was about the "broad disclosure" that made it improper; the fact that a subpoena compels "broad disclosure" is not itself determinative. To be sure, if broad disclosure is compelled because the subpoena is so indefinite that in order to comply the subpoenaed party must produce many unnecessary items, the subpoena may be deemed defective.[22] In the instant case,

[22] See, *e.g.*, *United States* v. *Olin Mathieson Chemical Corporation*, 36 F.R.D. 18 (S.D.N.Y.); *In re Subpoena Duces Tecum, Etc.*, 203 F. Supp. 575, 578 (S.D.N.Y.); *People* v. *Dorr*, 47 Ill. 2d 458, 265 N.E. 2d 601. Moreover, a subpoena may be deemed unreasonable if compliance would impose a disproportionate burden upon the subpoenaed party measured against the

however, the subpoenas specified with reasonable particularity the items sought to be produced. They identified respondent, his home and business addresses, and the precise dates at issue (October 1, 1972 to January 22 and January 23, 1973). Indeed, the subpoenas were in several respects more specific than the Internal Revenue Service "John Doe" summons to discover the identity of a person who had bank transactions suggesting possible liability for unpaid taxes, which was upheld in *United States* v. *Bisceglia, supra.*

The records sought were described with sufficient definiteness that the subpoenaed parties knew what was sought and were able to comply without undue difficulty. This alone is strong evidence of the adequacy of the description. *Brown* v. *United States,* 276 U.S. 134, 143.

B. EVEN IF DEFECTIVE, THE SUBPOENAS DID NOT CONSTITUTE AN UNREASONABLE SEARCH OR SEIZURE

1. The court of appeals assumed, again without analysis, that the deficiencies it perceived in the issuance of the subpoenas *duces tecum* amounted to a Fourth Amendment violation. Even if it is assumed that the subpoenas were defective in one or more of the respects stated by the court, however, that fact has no constitutionally significant bearing on the question whether the subpoenas constituted an unreasonable search or seizure. Since a subpoena *duces tecum* does not by itself authorize government officers to compel production of any items, there is no justification or precedent for creating a presumption of unconstitutionality when the subpoena does not conform to all technical requirements. The proper test to be applied

relevance and materiality of the items to the grand jury's inquiry. See pp. 46–47, *infra.*

is whether the subpoena, if enforced by the court, would result in an unreasonable search or seizure. By that standard, the subpoenas in the instant case were not unreasonable.

The reasonableness of an investigation for the purpose of eliciting evidence that may be helpful to the grand jury in determining whether a crime has been committed and, if so, by whom, is appropriately judged by a different standard from that governing a police search or seizure that is undertaken to gather evidence of a crime, since the two processes have significantly distinct effects and purposes. The differences this Court has noted between the impact of an arrest and of a subpoena *ad testificandum* are equally pertinent with respect to the differences between a police search or seizure and a subpoena *duces tecum* (*United States* v. *Dionisio,* 410 U.S. 1, 10):

> The compulsion exerted by a grand jury subpoena differs from the seizure effected by an arrest [or police search and seizure] * * *. "The latter is abrupt, is effected with force or the threat of it and often in demeaning circumstances * * *. A subpoena is served in the same manner as other legal process; it involves no stigma whatever; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of the court." [Citation omitted.]

Moreover, it is irrelevant that the grand jury may have little or no probable cause to believe that the records it seeks will reveal incriminating information, since its function is essentially exploratory. "[T]he

Grand Jury * * * can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Bisceglia, supra,* 420 U.S. at 148, quoting from *United States* v. *Powell,* 379 U.S. 48, 57, and *United States* v. *Morton Salt Co.,* 338 U.S. 632, 642–643. Indeed, if its investigation is to be meaningful, "[s]ome exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury." *Schwimmer* v. *United States,* 232 F. 2d 855, 862–863 (C.A. 8). The grand jury's task is to determine whether probable cause exists; it could hardly be expected to perform that function if it were required to have probable cause before undertaking its investigation. *United States* v. *Weinberg,* 439 F. 2d 743, 749 (C.A. 9); *United States* v. *Doe,* 460 F. 2d 328, 332 (C.A. 1), certiorari denied *sub nom. Popkin* v. *United States,* 411 U.S. 909

Nor is it relevant that, in gathering its evidence, the grand jury may intrude upon a witness's expectations of privacy. Given the grand jury's special role in insuring fair and effective law enforcement, every citizen has a basic obligation to produce evidence that may be relevant to its inquiry, even if "his responses might prove embarrassing or result in an unwelcome disclosure of his personal affairs." *United States* v. *Calandra,* 414 U.S. 338, 353. "Ordinarily * * * a witness has no right of privacy before the grand jury. Absent some recognized privilege of confidentiality, every man owes his testimony." *Ibid.* See also *Branzburg* v. *Hayes,* 408 U.S. 665, 688; *United States* v. *Weinberg, supra; United States* v. *Doe, supra.*

The pertinent question for judging the reasonableness of a subpoena *duces tecum* is, rather, whether compliance would be unnecessarily difficult because inordinately time-consuming, expensive, or otherwise inconvenient, when measured against the relevance and materiality to the grand jury's inquiry of the items sought in the subpoena." As Judge Learned Hand observed in *McMann* v. *Securities and Exchange Commission, supra,* 87 F.2d at 379:

> No doubt a subpoena may be so onerous as to constitute an unreasonable search. * * * Even then, the sanction is unobjectionable, unlike a descent upon one's dwelling or the seizure of one's papers; the search is "unreasonable" only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds.

[33] See *Hale* v. *Henkel*, 201 U.S. 43, 76-77 ("Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping * * *. [I]t is difficult to say how [the company's] business could be carried on after it had been denuded of this mass of material, which is not shown to be necessary in the prosecution of this case * * *."); *Brown* v. *United States*, *supra*, 276 U.S. at 143 ("Having produced [the subpoenaed documents] once without difficulty and without undue interference with the affairs of the association, so far as appears, there is no reason why he should not produce them again * * *.") *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 213 ("[T]he only abuses from which protection [from an unreasonable subpoena *duces tecum*] rightfully may be claimed * * * [are that of] [o]fficious examination [which] can be expensive * * * [and] time-consuming, clogging the process of business.").

Accordingly, if the items sought by the grand jury are vital to its inquiry, the subpoena is likely to be deemed reasonable, notwithstanding that compliance is significantly burdensome. Yet the subpoena is also likely to be reasonable when the items sought are less crucial to the inquiry, but compliance imposes little or no burden upon the subpoenaed party.

It would therefore be unlikely that a subpoena *duces tecum* which directs a bank to produce its records of a depositor's account would violate the depositor's Fourth Amendment rights, even if it is assumed that the depositor has a protectable Fourth Amendment interest in the records, since the depositor bears none of the burden of producing them. In the instant case, the subpoenas directed two bank presidents to testify and bring with them "all records of accounts * * * in the name of Mr. Mitch Miller * * *" (App. 26, 30). The subpoenas imposed no burden upon respondent whatsoever; they did not require him to produce any items nor to take any action.[34]

Moreover, the records sought by the subpoenas were clearly relevant and material to the grand jury's inquiry. The court of appeals did not deny that, at the time the subpoenas were issued, there was substantial basis for the relief both that respondent was involved in the offense under investigation and that the banks' records of his account might contain important evidence of the illegal activities. On Decem-

[34] Indeed, the banks, upon whom the burden of compliance fell, did not claim that the burden was unreasonable. See pp. 48–51, *infra*.

ber 18, 1972, a van-type truck, occupied by respondent's alleged co-conspirators, was found to contain distillery apparatus; on January 19, 1973, a 7500-gallon distillery and 175 gallons of non-tax-paid whiskey were found at the warehouse, which was rented by respondent. The banks' records of respondent's account from October 1, 1972 to January 22 or 23, 1973, therefore were likely to contain highly relevant and material evidence. The records thus were sought in connection with a specific investigation which in fact resulted in an indictment by the grand jury. In these circumstances, even if technically defective, the subpoenas *duces tecum* did not constitute an unreasonable search or seizure; accordingly, even if respondent had a protectable Fourth Amendment interest in the records produced, that interest was not abridged.

2. In any event, even if it is assumed that the subpoenas were defective and that respondent had a protectable Fourth Amendment interest in the banks' records of his transactions with it, the banks' voluntary compliance with the subpoenas *duces tecum* seeking production of the records in itself satisfied the Fourth Amendment.

It is well established that a third party's voluntary consent may validate an otherwise unreasonable search of an object or area over which the third party has "common authority." *United States* v. *Matlock,* 415 U.S. 164; *Frazier* v. *Cupp,* 394 U.S. 731, 740; *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 245–246. In *United States* v. *Matlock, supra,* the Court defined "[c]ommon authority * * * which justifies the third-

party consent" as "mutual use of the property by persons generally having joint access or control for most purposes" (*id.* at 171, n. 7).[35] A bank manifestly exercises at least as much control over, and has at least as much access to, its records of a depositor's account as does the depositor himself. The bank therefore has authority to permit government access to such records, notwithstanding any protectable Fourth Amendment interest that its depositor may also have in them. Indeed, a depositor gives his bank such complete freedom of access to information contained on instruments which he deposits and which his payees present for payment that he in effect accepts the risk that the bank will consent to a governmental search. See *Frazier* v. *Cupp,* 394 U.S. 731, 740.

A bank officer's decision to comply with a subpoena *duces tecum* seeking access to its records is no less voluntary because the subpoena states that its recipient is "commanded" to produce such records. Unlike a search warrant, a subpoena *duces tecum* is not self-enforcing; it confers no authority on government agents to search or seize, and nothing may be taken from the subpoenaed party if he refuses to comply.

> The service of a subpoena is but the delivery of a paper to a party—is open and aboveboard. There is no element of trespass or force in it. It does not disturb the possession of property. It cannot be finally enforced except after challenge, and a judgment of the court upon the challenge [*Hale* v. *Henkel,* 201 U.S. 43, 80, McKenna, J., concurring].

[35] See Weinreb, *Generalities of the Fourth Amendment,* 42 U. Chi. L. Rev. 47, 54–64 (1975).

A subpoena *duces tecum* may be resisted by obtaining an order to quash it if production would be "unreasonable or oppressive" (Rule 17(c), Fed. R. Crim. P.; see also *United States* v. *Nixon, supra,* 418 U.S. at 697–699) or contesting the subpoena in a show cause hearing. See p. 39, *supra.* A bank officer's acquiescence is therefore unlike a consent to search given after police have stated that they possess a search warrant (see *Bumper* v. *North Carolina,* 391 U.S. 543). Indeed, his consent may be valid even in the unlikely event that he is unaware of the bank's right to refuse to comply with the subpoena *duces tecum. Schneckloth* v. *Bustamonte,* 412 U.S. 218, 234.

In the instant case, there is no reason to suppose that the banks' compliance was not entirely voluntary. The subpoenas were served on the presidents of the two banks where respondent had accounts. The two bank presidents can be presumed to be mature and intelligent persons who are reasonably knowledgeable about the bank's rights and obligations in such matters. Moreover, the subpoenas were served during business hours at the place of business where the records were required by law to be maintained. The record reveals nothing in the manner by which they were served that was likely to coerce or intimidate their recipients. See *Davis* v. *United States,* 328 U.S. 582, 593–594.

Bank records should not be excepted from the general rule that recognizes the validity of a third party consent to search. Such an exception would seriously impair the functioning of the grand jury, which is critically dependent upon its ability to obtain information in the hands of third parties about transactions under investigation in which they participated. This is particularly true with regard to banks, whose records of their transactions are often indispensable to a successful inquiry.

III

EVEN IF A FOURTH AMENDMENT VIOLATION WERE ASSUMED, A RETRIAL, WITH EXCLUSION OF THE EVIDENCE OBTAINED BY THE DEFECTIVE GRAND JURY SUBPOENAS, WOULD BE AN INAPPROPRIATE REMEDY

Even if this Court were to conclude, contrary to our contentions, that the subpoenas *duces tecum* were defective and violative of respondent's Fourth Amendment rights, it would not follow that the proper remedy would be "a new trial free from the taint of evidence improperly acquired" (Pet. App. A, p. 16a). A new trial would merely waste judicial resources, since the excluded bank records presumably could be reacquired pursuant to validly issued subpoenas, and the evidence derived therefrom reintroduced, under the "independent source" doctrine of *Wong Sun* v. *United States,* 371 U.S. 471, 488. Cf. *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 392.[38] The government's knowledge of the existence and location of the records of respondent's bank accounts was derived independently from the "seizure"

[38] The court of appeals did not address the question whether this evidence, even though held to have been improperly obtained in connection with the prior trial, could now be lawfully obtained through regular process acceptable in form to the court of appeals. If there is to be a new trial, considerations of judicial economy would appear to call for some consideration of this question at the present time.

effected under the original subpoenas. Indeed, at the time they were served, the government was fully aware that the Bank Secrecy Act required the banks to maintain the records, and that the records would be in their custody. See *United States* v. *Kleen Laundry and Cleaners, supra,* 381 F. Supp. at 524.

In any event, it is manifestly unnecessary to adopt an exclusionary rule to assure compliance with the proper procedures for issuing subpoenas *duces tecum.* Unlike circumstances where exclusion is deemed necessary as a means of correcting and forestalling certain forms of police behavior that violate Fourth Amendment rights, an exclusionary principle in this context would be addressed to regulation of the conduct of government attorneys, presumably to insure that they inform bank depositors whenever subpoenas *duces tecum* are directed at the banks with which they deal seeking records of their accounts, so that the depositors may challenge any improprieties. There is no reason, however, to suppose that government attorneys would disobey such a notice requirement. Accordingly, the drastic remedy of exclusion of relevant evidence in criminal cases is not warranted here.

Moreover, there is no reason to believe that any deficiency in the subpoenas *duces tecum* directed at the two banks here was deliberate. Nor was there any reason for the government attorney who was conducting the grand jury investigation to believe that the subpoenas were in any way defective or that he was required to notify respondent at the time the subpoenas were served. At that time, the courts had uniformly held that a bank depositor had no Fourth Amendment interest in the bank records of his account (see n. 16, *supra*). As this Court recently noted, "[t]he deterrent purpose of the exclusionary rule necessarily assumes * * * willful, or at the very leat negligent, conduct * * *. Where the official action was pursued in complete good faith, * * * the deterrence rationale loses much of its force." *Michigan* v. *Tucker,* 417 U.S. 433, 447.

Finally, we submit that exclusion is an inappropriate remedy for procedural irregularities that have no significant bearing upon substantial rights. Where, as here, there is no showing that the alleged defects significantly prejudiced respondent's Fourth Amendment rights (even if it is assumed that he had a protectable Fourth Amendment interest at stake), and there is every reason to believe that the subpoenas would have been enforced even had respondent been given an opportunity to challenge them, the violation was not of sufficient magnitude or consequence to justify use of the exclusionary rule. See, *e.g., United States* v. *Burke,* C.A. 2, No. 75–1021, decided May 15, 1975

(Friendly, J.) *United States* v. *Soriano*, 482 F. 2d 469, 478 (C.A. 5), modified on rehearing *en banc*, 497 F. 2d 147. Accordingly, suppression of the evidence derived from the allegedly defective subpoenas was at all events an inappropriate remedy in this case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded to that court (see n. 9, *supra*).

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